88-1245

No.

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

HARRY DuCHESNE, PETITIONER

v.

WYLIE WILLIAMS, JR. AND THE CITY OF INKSTER

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether procedural due process rights are violated when the only discharge hearing for a public employee, held prior to termination, is before a supervisor who is biased against the employee, formulated charges against him, and testified extensively against him at the hearing.

2. Whether the court of appeals erred in holding that a public employee is only entitled to a pretermination hearing before the supervisory official responsible for the discharge regardless of whether the bias of the official makes the pretermination hearing meaningless.

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PETITION FOR A WRIT OF CERTIORARI
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Gary R. Rentrop and Susan E. Morrison, on behalf of Harry DuChesne, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. This is a conditional petition which we intend to press upon the court only in the event that the Petitioner is denied relief in proceedings now pending before the district court on remand from the court of appeals.

Petitioner requests this course of action in order to preserve his right to review upon a question of very great importance in the application of procedural due process under the Fourteenth Amendment to the United States Constitution while, at the same time, avoiding burdening the court with a constitutional question at a time when the precise impact and extent of the ruling of the court of appeals on the proceedings pending in the district court has not yet been determined and when there is still a possibility that Petitioner may obtain relief on alternate grounds.

The Petitioner respectfully submits that this Petition for a writ of certiorari should be held in abeyance pending action by the district court which will determine whether Petitioner is entitled to relief. If Petitioner is denied relief in the district court, it will then be clear that there is a

need for review of the important Constitutional question decided by the court of appeals. Thereafter, Petitioner will promptly advise the court whether it desires to press the petition because resolution of the constitutional issue is necessary to serve the ends of justice in this case or to withdraw the petition because the Petitioner has been granted the relief he seeks on alternate grounds.

OPINIONS BELOW

The opinion of the court of appeals upon rehearing (App. B, infra) is reported at 849 F.2d 1004. The initial opinion of the court of appeals was vacated and withdrawn from publication (App. E, infra). The opinion of the district court (App. F, infra) is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, infra) was entered June 20, 1988. A Petition for Rehearing was denied on July 22, 1988 (App. D., infra). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

2. Section 109.2 of the BOCA [Building Officials and Code Administrators International, Inc.] National Building Code/1981 adopted by reference in Michigan Administrative Code, 1981 R. 408.30401 and applicable in the City of Inkster pursuant to

Ordinance provides in relevant part:

> . . . [T]he code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority.

STATEMENT

Petitioner, Harry DuChesne, had worked as the Chief Building Inspector for the City of Inkster, Michigan, prior to this discharge by Respondent Wylie Williams, Jr., the former City Manager. Shortly before Petitioner's discharge, a dispute had arisen between Petitioner and Respondent Williams regarding payment of construction bills for the repair of the Inkster Ice Arena. Petitioner had declined to approve payments for a portion of the construction because in his opinion the work did not conform to City specifications. Respondent Williams directed approval of the

payments. At a City Council meeting on September 6, 1983, Petitioner was questioned by a council member concerning his opinion of the ice arena work at issue. The Petitioner reiterated his position that the work did not comply with city specifications, and that it was the City Manager that was urging approval of the bills. Petitioner was discharged by Respondent Williams six days later on September 12, 1983.

After receiving notice of termination, Petitioner, through his attorney requested City Council for a hearing under BOCA Code §109.2 and in accordance with due process. The City agreed but initially refused to reinstate Mr. DuChesne pending the outcome of the hearing. Petitioner immediately filed suit in the district court. The City then agreed to pay Petitioner's wages and benefits pending the hearing and provided a written list of reasons for the discharge. A full

trial-type hearing took place on October 6, 17, and November 10, 1983, at which both sides were represented by counsel and both sides presented witnesses and engaged in cross-examination. Over Petitioner's objection, Respondent Williams presided over the hearing; he had also created many of the charges and testified extensively against Petitioner on disputed factual questions at the hearing. The City Manager reaffirmed the discharge on November 18, 1983. The hearing before Respondent Williams was the only discharge hearing provided to Petitioner by the City of Inkster.

Petitioner filed a Motion for Partial Summary Judgment in the district court based on the argument that the discharge hearing he had received violated his right to procedural due process because of the bias of the City Manager who had acted as accuser, witness and judge. The district court granted

Petitioner's motion on July 25, 1985. Later the court ordered as a remedy a new hearing pursuant to the BOCA Code, reinstatement of Petitioner on the payroll pending the outcome of the hearing, and partial back pay.

Respondents appealed from the orders establishing the remedy for the due process violation. Respondents' request for a stay was denied by both the district court and the court of appeals. On June 16, 1987, a panel of the court of appeals affirmed the district court's order in all respects. The parties proceeded with a new discharge hearing before a court-appointed hearing officer. That hearing was a full trial-type hearing which took place over nine days. Both sides were represented by counsel, presented evidence and cross-examined witnesses. After the conclusion of that hearing, the hearing officer found that Petitioner had been discharged without cause and recommended that

he be reinstated and made whole.

On June 20, 1988, the court of appeals in an en banc rehearing of the June 16, 1987 opinion, reversed the judgment of the district court, vacated and dissolved the injunction entered by the district court and remanded the case with instructions to dismiss the plaintiff's Loudermill pretermination claim of deprivation of property without procedural due process and for further proceedings on other constitutional and pendent state claims. The majority ruled that under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), a public employee is entitled prior to termination only to a "right of reply before the official responsible for the discharge," (849 F.2d at 1005), even if the official is "so biased that the Loudermill "right-of-reply" process is meaningless." Id. at 1008. Judge Ryan, joined by Judges

Engel, Keith and Jones, dissented on the basis that if there is a constitutional entitlement to a pretermination hearing "it must of necessity be a hearing that has some meaning to it. . . ." Id. at 1010.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning procedural due process rights of public employees. The court of appeals' majority has held that even though a public employee with a protected property interest in continued employment has a constitutional right to a pretermination hearing, there is no requirement that the hearing be a meaningful one. The majority interprets this court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) as entitling a public employee only to a right of reply before the official

responsible for the discharge regardless of the bias of that official. The majority acknowledges that "there may be cases--perhaps this is one of them--in which the supervisory official is so biased that the Loudermill "right-of-reply process is meaningless." 849 F.2d at 1010.

The court of appeals' ruling seriously misconstrues the due process requirements of Loudermill, supra. Loudermill established the right to "'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Id. at 542. This court noted that "[t]the formality and procedural requisites for the [pretermination] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Id. at 545. The

holding as to the extent of pretermination due process required in the Loudermill case rested in part on state law provisions which provided for a full post-termination administrative hearing for the Plaintiffs in that case. Loudermill holds that a tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Id. at 546.

The court of appeals' holding that the pretermination hearing right is limited to a right of reply before the official responsible for the discharge regardless of that official's bias is an unwarranted interpretation of Loudermill. Indeed, the purpose of the pretermination hearing is described in Loudermill as "an initial check against mistaken decisions." Id. at 545. This purpose cannot be met without the most

fundamental requisite of due process--an unbiased decision maker. As Judge Ryan states in his dissent, 849 F.2d at 1010:

> If, however, there is a constitutional entitlement to a pretermination hearing in this case, as my colleagues correctly hold there is, it must of necessity be a hearing that has some meaning to it--a hearing in which there is at least a reasonable likelihood that the person conducting the hearing, if not entirely impartial, is not so personally involved in the accusation and charges against the subject employee as to be incapable of "hearing" what the employee has to say because of the preempting, deafening sound of his own biased accusatory voice.

The court of appeals majority also failed to address a critical issue in its pretermination due process analysis--the fact that the hearing before Respondent Williams was the only discharge hearing which Harry DuChesne received from the City of Inkster. The court of appeals majority emphasized that the function of a post-termination discharge hearing was to ferret out bias that occurred

in the pretermination hearing while failing to note that Petitioner did not have subsequent administrative hearings available. The BOCA Code provided for a full hearing to be held prior to discharge rather than after discharge. The court of appeals majority has accordingly ignored a critical element of due process analysis. As noted by this court in Loudermill, "the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures." Id. at 547 n.12.

A more appropriate analysis would be that which was applied in Salisbury v. Housing Authority of the City of Newport, 615 F. Supp. 1433, 1438-39 (D.C. Ky. 1985). In that case the plaintiff had received an extensive hearing prior to termination, but claimed it was tainted by the bias of the decision maker as in the present case.

Because it was the only hearing provided to that plaintiff, the court analyzed it under post-termination due process standards.

In sum, under the facts of this case Petitioner's pretermination due process rights were violated. As the dissent notes,

> there is no construction of the facts of this case that could support the view that Williams was not too biased to give DuChesne a fair hearing. . . . The record clearly shows the existence of personal animosity between Williams and DuChesne such that Williams' subsequent impartiality was, at a minimum, suspect. . . . This, taken together with Williams' in-depth involvement in every stage of the proceedings, forbids the conclusion that Williams was a suitable hearing officer.

849 F.2d at 1011.

The notion of a constitutional right without a remedy or a right that is meaningless is antithetical to our system of justice. Particularly under the facts of this case where the Petitioner was only

provided with one discharge hearing, the due process clause requires a pretermination hearing in which the supervisory official is not so biased that the Loudermill pretermination due process requirements are meaningless.

CONCLUSION

The petition for a writ of certiorari should be held in abeyance until the conclusion of further proceedings now pending before the district court after remand by the court of appeals.

Respectfully submitted,

SIUDARA, RENTROP, MARTIN & MORRISON

BY: _____
GARY R. RENTROP (P19367)

BY: _____
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Attorneys for Petitioner

APPENDIX A

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

CONSTITUTIONAL AND ORDINANCE PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

2. Section 109.2 of the BOCA [Building Officials and Code Administrators International, Inc.] National Building Code/1981 adopted by reference in Michigan Administrative Code, 1981 R. 408.30401 and applicable in the City of Inkster pursuant to Ordinance provides:

> 109.2 Appointment: The code official shall be appointed by the chief appointing authority of the jurisdiction; and the code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority.

APPENDIX B

UNITED STATES COURT OF APPEALS DECISION

DECIDED AND FILED JUNE 20, 1988

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-1017

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRY DUCHESNE,
Plaintiff-Appellee,

v.

WYLIE L. WILLIAMS, JR., and the CITY OF INKSTER, a municipal corporation,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 20, 1988

Before: ENGEL, Chief Judge*; LIVELY, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges.**

MERRITT, J., delivered the opinion of the court, in which LIVELY, KENNEDY, MARTIN, KRUPANSKY, WELL-

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

**The Honorable Ralph B. Guy recused himself from participation in this appeal.

FORD, MILBURN, NELSON, BOGGS and NORRIS, JJ., joined. WELLFORD, J. (p. 10), and NELSON, J. (pp. 11-12), delivered separate concurring opinions. RYAN, J. (pp. 13-17), delivered a separate dissenting opinion, joined by ENGEL, C.J., KEITH and JONES, JJ.

MERRITT, Circuit Judge. This procedural due process case brought under § 1983, Title 42, U.S. Code (1982), presents this single issue on appeal: Does *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), *aff'g*, 721 F.2d 550 (6th Cir. 1983), require that a discharged municipal employee receive a pretermination hearing *before a neutral and impartial decisionmaker* rather than before the supervisor who fired him? The District Court, and the panel decision of our Court which has now been vacated by the grant of *en banc* review (see Rule 14, Rules of the Sixth Circuit), held that *Loudermill* requires a pretermination hearing before a neutral decisionmaker, instead of simply giving the employee the right to respond to his supervisor in order to rebut or explain the reasons given for the discharge. We accept the reasoning of the Fourth and Fifth Circuits in *Garraghty* v. *Jordan*, 830 F.2d 1294, 1302 (4th Cir. 1987)("a pre-deprivation proceeding need not be a full evidentiary hearing with witnesses and a neutral decision maker"), and *Schaper v. City of Huntsville*, 813 F.2d 709, 715 (5th Cir. 1987)(same), that a right of reply before the official responsible for the discharge is the entitlement contemplated in *Loudermill*. We therefore reverse.

Plaintiff worked as Chief Building Inspector for the City of Inkster, Michigan, for more than a year until his termination on November 18, 1983. Defendant Williams, the City Manager, informed plaintiff on September 12, 1983, that his employment would be terminated for several reasons, including the fact that he had engaged in "improper conduct . . . before City Council by impugning the integrity of the City Manager, City Council, and other independent contractors." App. 306. Plaintiff had told Council members the week before that the City Manager had approved of payments for

repair work on the city ice arena and that the City should not pay the bill because the work did not conform to specifications. App. 383.

Upon receiving notice of termination, plaintiff's lawyer wrote the City Council requesting a pretermination due process hearing. The City agreed but initially refused to reinstate him pending the hearing's outcome. Plaintiff immediately filed a complaint against the City Manager and the City in the District Court alleging federal due process and First Amendment deprivations, and pendent state law claims. The City then agreed to pay plaintiff's wages and benefits pending the hearing. The City Manager immediately gave plaintiff a written description containing numerous reasons for the discharge. A pretermination hearing took place on October 6, 17, and November 10, at which plaintiff, as he had requested, was represented by legal counsel, was allowed to present witnesses supporting his theory that the City did not have just cause to terminate him and was allowed to cross-examine the City's witnesses. App. 12. Over plaintiff's objection, the City Manager presided over the hearing; he also testified against plaintiff. On November 18, 1983, the City Manager reaffirmed the discharge.

Plaintiff then filed a motion for partial summary judgment in his federal lawsuit arguing that the pretermination hearing he received did not comply with federal procedural due process requirements. Although plaintiff conceded that the City gave him the pretermination hearing he had requested, he argued that since the City Manager was both a witness and the decisionmaker, the hearing did not comply with due process. He explained that the hearing he received was not the "fair and impartial hearing required by the Constitution," and "defendants clearly violated his rights to due process by not affording him an impartial decisionmaker at his discharge hearing." App. 304, 362.

The District Court required both parties to submit supplemental briefs in light of the Supreme Court's then recent pro-

nouncement in *Loudermill.* The District Court then granted plaintiff's motion and issued an injunction requiring as a matter of federal due process a trial-type pretermination evidentiary hearing before a neutral decisionmaker. It concluded that under Michigan law, plaintiff had a sufficient "property interest" in his job to trigger the *Loudermill* due process procedures and that under *Loudermill,* and previous federal cases, plaintiff was entitled to a pretermination hearing before a "neutral decisionmaker." This appeal followed. The defendants contend here that the plaintiff had neither a "property interest" in his job, nor—if such a property interest does exist—the right to a hearing before an impartial judge.

We do not reach the "property interest" issue, a complex problem as yet unresolved in Michigan law,[1] for it is clear to us that, assuming such a property interest does exist, the procedures followed at plaintiff's hearing provided all the process that was due under *Loudermill.* Interpreting

---

[1]Plaintiff contends that a series of state laws and local ordinances create a property right in his continued employment. He explains that a City ordinance adopting the Building Officials and Code Administrators International, Inc., Basic Building Code (BOCA Code), and the BOCA Code itself, create a property right in his employment. He also claims a contractual property right in his employment under *Toussaint v. Blue Cross & Blue Shield of Michigan,* 408 Mich. 579, 292 N.W.2d 880 (1980). Defendants contend that plaintiff has no property right in his job because the City adopted the State Construction Code Act, rather than the BOCA Code, and the City Charter provides that officials in plaintiff's employment class are employees at will. Also, defendants argue that even if the City adopted the BOCA Code, it does not apply to plaintiff.

Without resolving the *Toussaint* question, the District Court found that the City ordinance and the BOCA Code create a property right in plaintiff's employment, even though the BOCA Code does not explicitly indicate that it controls government employer/employee relations. Hearing Tr., February 17, 1984, 19-20. Under our disposition of this appeal, we need not resolve these complicated state law issues.

Loudermill, the Fourth and Fifth Circuits in *Garraghty* and *Schaper*, *supra*, have recently squarely held that the property interest created in the normal government job covered by a civil service system, which creates a "just cause" requirement for discharge, does not entitle the employee to an impartial judge at the pretermination "right-of-reply" hearing. The right to respond before the official responsible for the discharge is sufficient. We find no Court of Appeals holdings to the contrary. Some District Courts have held otherwise. *Rosario Torres v. Hernandez Colon*, 672 F. Supp. 639, 652-53 (D.P.R. 1987)(neutral decisionmaker required in pretermination hearing); *Cook v. Bd. of Educ.*, 671 F. Supp. 1110, 1116 (S.D. W. Va. 1987)(same); *Salisbury v. Housing Auth.*, 615 F. Supp. 1433, 1438-41 (E.D. Ky. 1985).

This Court observed in our decision by Judge Timbers in *Loudermill* that the functions of a full adjudicatory, adversary, post-termination hearing and of a limited "right-of-reply" pretermination hearing are different: "[T]he fact that Ohio provided appellants in this case with full evidentiary hearings [with an impartial judge] after termination does not suggest that no other process was due." 721 F.2d at 560. The purpose of the later formal hearing is to adjudicate facts and to formulate and decide on the legal principles applicable to the circumstances. The purpose of the pretermination presentation to the supervisor is different: "[I]f they [the employees] had been afforded some limited right to challenge the impending discharges, the discharge order might well have been rescinded" because they would have had "an opportunity to present their side of the case" at an early stage to the official responsible for the discharge. *Id.*

The Supreme Court accepted this reasoning in its opinion reviewing *Loudermill*. The Court said that before termination the employee should receive "notice" and the opportunity to "respond." The purpose is not to "definitively resolve the propriety of the discharge," as would be the case at the

later formal hearing. 470 U.S. at 545. Rather, the hearing's purpose is limited:

> It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Id. at 545-46.

The Court narrowed the essential ingredients of this pretermination hearing to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. The Court also looked to the municipal employer's interest, emphasizing that "[t]o require more than this *prior to termination* would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* (emphasis added). This reading of *Loudermill* is reinforced by comparing Justice Marshall's concurring opinion with the majority opinion. The *Loudermill* majority deliberately chose not to include within its definition of pretermination hearing rights the panoply of trial-type hearing rights advocated by Justice Marshall, which included a full evidentiary, adversary, adjudicatory hearing with an impartial judge. *Id.* at 548 (Marshall, J., concurring in part and concurring in the judgment).

As the Fourth Circuit recognized in *Garraghty*, 830 F.2d at 1300, this reading of *Loudermill* is also reinforced by the fact that in *Loudermill* the Court suggested that its decision was an application of the principle announced in *Goss v. Lopez*, 419 U.S. 565 (1975), a case holding that a public school student must be given a presuspension limited hearing before the "disciplinarian" so that "the *disciplinarian* may informally discuss the alleged misconduct with the student," thus affording the student adequate "notice" and "an opportunity to explain his version of the facts." 419 U.S. at 581-82

(emphasis added). In *Loudermill* the Court explained what it meant by giving "some opportunity for the employee to present his side of the case" by engaging in an extended discussion of *Goss v. Lopez*, a discussion which begins:

> Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity *to invoke the discretion of the decisionmaker* is likely to be before the termination takes effect. *See Goss v. Lopez*, 419 U.S. at 583-84.

470 U.S. at 543 (emphasis added). Note that the Court uses the word "decisionmaker," which means the official responsible for the discharge. If there were any lingering doubt about the Court's meaning, it is resolved by the footnote immediately following its citation to *Goss v. Lopez*. The footnote specifically states that the Court contemplates a limited *Lopez*-type hearing before the "employer":

> The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect. . . . [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss v. Lopez*, 419 U.S. at 583-84.

470 U.S. at 543-44 n. 8 (bracketed words and elipsis in original).

The differences in the function and purpose of the pre- and post-termination hearings become clearer when we contemplate the opposing claim of an employee who has not pre-

vailed in a full adjudicatory, trial-type, pretermination hearing. That employee's claim would be that a formal pretermination adjudicatory hearing before an impartial judge is not a sufficient due process substitute for the right to correct or modify the mistaken impressions of the supervisor who has threatened his discharge. He would argue along the lines discussed in our opinion in *Loudermill* and the Supreme Court's reasoning in *Lopez* and *Loudermill* that his supervisor's more concrete understanding and familiarity with the nature of the employee's job and conduct, his supervisor's potential willingness to forgive or give another chance, the informality of the "hearing" before the supervisor, and the lack of adversary formality and contentiousness associated with lawsuits have certain advantages over the formal adjudicatory hearing. Were we to adopt the District Court's rule, we would not be surprised to find an employee, discharged after a formal pretermination hearing, arguing that he has not been allowed to "invoke the discretion" of his employer and that he would have been retained if he could have talked to his supervisor first.

We acknowledge that there may be cases—perhaps this is one of them—in which the supervisory official is so biased that the *Loudermill* "right-of-reply" process is meaningless. The full, post-termination, adversary, trial-type hearing will serve to ferret out bias, pretext, deception and corruption by the employer in discharging the employee. The adversary processes employed in an adjudicatory, post-termination hearing controlled by an impartial judge lend themselves to proving wrongful conduct by the employer. The limited, "right-of-reply" pretermination hearing, as defined in *Loudermill*, is designed "to invoke the employer's discretion," his sense of fairness and mutual respect, his willingness to reconsider. It is not designed or well-adapted to uncover the employer's bias or corrupt motivation. For a more extended discussion of this point, see Judge Kiser's well-considered opinion in *Crocker v. Fluvanna County*

Board of Public Welfare, 676 F. Supp. 711, 715-17 (W.D. Va. 1987),[2] and Professor Davis' exhaustive discussion of the differences in the purposes of the "Trial-Type Hearing" (Ch. 12) and "Fair Informal Procedure" (Ch. 13) in II K. Davis, *Administrative Law Treatise*, 405-522 (2d ed. 1979).

For these reasons the judgment of the Court below is reversed, the injunction is vacated and dissolved, and the case is remanded with instructions to dismiss the plaintiff's *Loudermill* pretermination claim of deprivation of property without procedural due process, as discussed above, and for further proceedings on other constitutional and pendent state claims.

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[2]Judge Kiser begins his discussion with the following quotation from Justice Powell on the question of an impartial judge at a pretermination hearing:

> In most cases, the employee's supervisor is the official best informed about the "cause" for termination. If disqualification is required on the ground that the response of the supervisor could not be wholly impartial, the removal procedure would become increasingly complex. And, in fact, a "mini trial" would be necessary to educate the impartial decisionmaker as to the basis for termination.

Arnett v. Kennedy, 416 U.S. 170 n. 5, 94 S.Ct. 1652 n. 5 (Powell, J., concurring in part and concurring in the result in part), quoted in *Crocker*, 676 F. Supp. at 716.

WELLFORD, Circuit Judge, concurring.

As an original member of this court's panel in *Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983), *aff'd* 470 U.S. 532 (1985), I am in accord with Judge Merritt's analysis of *Loudermill* as it relates to the issues of this case. I write separately to state my original concern about the issue of mootness, but I note that plaintiff's counsel at oral argument took the position that not all the issues involved were moot. I agree not only with the result reached and Judge Merritt's reasoning in reaching that result, but would also note my disagreement with plaintiff's argument that BOCA requirements equate with or set out the constitutional due process requirements involved in this discharge.

DAVID A. NELSON, Circuit Judge, concurring. I concur in the judgment and in the opinion Judge Merritt has written for the court, but write separately to record my understanding that Michigan law does in fact provide for the sort of "full, post-termination, adversary, trial-type hearing" that, as Judge Merritt has said, would "serve to ferret out bias, pretext, deception and corruption by the employer in discharging the employee."

In *Hawkins v. Common Council of Grand Rapids*, 192 Mich. 276, 158 N.W. 953 (1916), the Michigan courts nullified, on the ground of bias, the removal of an elected city treasurer. More recently it has been held that Michigan courts may enjoin a discharge that would not meet constitutional requirements. *State Employees Association v. Department of Mental Health*, 421 Mich. 152, 365 N.W.2d 93, 100 (1984).

The plaintiff in the case at bar had the burden of pleading and proving the inadequacy of his remedies under state law. *Wilson v. Beebe*, 770 F.2d 578, 583 (6th Cir. 1985) (*en banc*); *Vicory v. Walton*, 721 F.2d 1062, 1065-66 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984). Far from alleging that Michigan law gives him no right to a proper post-termination hearing, the plaintiff specifically pleaded that his interests in his continued employment "are protected under Mich. Const. 1963, Art. 1, § 17." His amended complaint also set forth claims sounding in contract and tort under the common law of Michigan, which claims could likewise be resolved in a post-termination adversary proceeding. Contrary to my original view,[1] therefore, I am persuaded that the plaintiff failed

[1]Although, as a member of the three-judge panel that heard this appeal originally, I dissented from the conclusion that the plaintiff could recover back pay even if it should ultimately be established that there was good cause for the discharge, I expressed the view that "the procedure followed in the termination of the employment failed to pass constitutional muster." I now find myself in the same boat as that on which Baron Bramwell confessed himself a passenger when he said "[t]he matter does not appear to me now as it appears to have appeared to me then." *Andrews v. Styrap*, 26 L.T.R. (N.S.) 704, 706 (Ex. 1872).

to state a claim for deprivation of property without the process due him under the Federal Constitution.

RYAN, Circuit Judge (dissenting). As the author of the opinion for this court that affirmed the decision of the district court and which was later vacated by the order of a majority of my colleagues, I respectfully dissent.

I have no disagreement at all with the court's assertion that the pretermination hearing to which certain public employees are entitled does not carry with it the whole panoply of guarantees that may be required by the due process clause for a post-termination hearing such as the rights to produce witnesses, introduce evidence, cross-examine witnesses, and have the assistance of counsel. Likewise, I agree that the Constitution does not entitle a tenured public employee to a pretermination hearing before a "neutral decisionmaker" or "an impartial judge," as my colleagues put it.

The court's en banc opinion incorrectly states that

> The District Court, and the panel decision of our Court which has now been vacated by the grant of *en banc* review (see Rule 14, Rules of the Sixth Circuit), held that [*Cleveland Board of Education v.*] *Loudermill* [, 470 U.S. 532 (1985),] requires a pretermination hearing before a *neutral decisionmaker*. . . .

(Emphasis added.) This court's panel decision did not hold that *Loudermill* requires a hearing before a "neutral decisionmaker." The district court said that; the panel did not. Indeed, writing for the panel, I stated:

> It is not constitutionally required that the decisionmaker be absolutely impartial.

Duchesne v. Williams, No. 86-1017, slip op. at 12 (6th Cir. June 16, 1987).

If, however, there is a constitutional entitlement to a pretermination hearing in this case, as my colleagues correctly hold there is, it must of necessity be a hearing that has some

meaning to it—a hearing in which there is at least a reasonable likelihood that the person conducting the hearing, if not entirely impartial, is not so personally involved in the accusation and charges against the subject employee as to be incapable of "hearing" what the employee has to say because of the preempting, deafening sound of his own biased accusatory voice. If at least that measure of impartiality is not required of the individual conducting a pretermination hearing, then the hearing would indeed be meaningless.

My brother observes "that there may be cases—perhaps this is one of them—in which the supervisory official is so biased that the *Loudermill* 'right of reply' process is meaningless." Indeed it is one of them, and that was the basis for the district court's decision, this court's panel decision, and this dissent.

As I pointed out in part IV of the opinion for the court, from which there was no dissent, and which has now been vacated,

> In the district court's view, the pre-existing animosity between Williams and Duchesne, and the fact that it was Williams who initially fired Duchesne, who developed many of the charges against Duchesne, who testified against Duchesne at the hearing, and who thereafter weighed the evidence and decided that it supported Duchesne's termination, sufficed to destroy the fairness of the termination hearing.
>
> We recognize that an employment termination hearing is ordinarily presided over by a decisionmaker with at least some connection with the employer, if not a broad shared interest. It is not constitutionally required that the decisionmaker be absolutely impartial. In *Hortonville Joint School District v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), the Supreme Court held that striking teach-

ers' termination hearings before the same body against whom they were striking, the local school board, and with whom the teachers bargained collectively over the terms of their employment, were not constitutionally invalid. The Court reasoned that "the teachers did not show, and the Wisconsin courts did not find, that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity." *Id.* at 491-92. The Court also stated:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker. Withrow v Larkin, 421 US 35, 47, 43 L Ed 2d 712, 95 S Ct 1456 (1975); FTC v Cement Institute, 333 US 683, 700-703, 92 L Ed 1010, 68 S Ct 793 (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' United States v Morgan, 313 US 409, 421, 85 L Ed 1429, 61 S Ct 999 (1941); see also FTC v Cement Institute, supra, at 701, 92 L Ed 1010, 68 S Ct 793."

Id. at 493. After weighing the interests involved, the Court concluded that the teachers had "failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process." *Id.* at 496.

We also recognize that, under *Hortonville*, a less than impartial decisionmaker may be tolerable if there are no contested issues of fact to be resolved

by that decisionmaker. In *Kendall v. Board of Education*, 627 F.2d 1 (6th Cir. 1980), this court held that a school board's pretermination grievance procedure was constitutionally inadequate because the teacher whose contract was terminated

> "was compelled to appear before the same administrators who had investigated the incidents and recommended her dismissal. Since factfinding on the accusations was necessary, due process requires that the same administrators who investigated the matter not determine her guilt or innocence."

* * *

[But] there is no construction of the facts of this case that could support the view that Williams was not too biased to give Duchesne a fair hearing. Even if he is accorded "the presumption of honesty and integrity in policymakers with decisionmaking power," *Hortonville*, 426 U.S. at 497, the record clearly shows the existence of personal animosity between Williams and Duchesne such that Williams' subsequent impartiality was, at a minimum, suspect. *Cf. Taylor v. Hays*, 418 U.S. 488, 501 (1974). This, taken together with Williams' in-depth involvement in every stage of the proceedings, forbids the conclusion that Williams was a suitable hearing officer. Williams was involved in some of the incidents that formed the basis for Duchesne's termination, and he was principally responsible for accusing, trying, and deciding the issues at Duchesne's hearing. Under the circumstances, the hearing provided to Duchesne was constitutionally deficient.

Duchesne, No. 86-1017, slip op. at 11-14.

Thus, neither the district court's dispositive opinion nor this court's panel decision held that Duchesne's due process rights were violated because he was not given a pretermination hearing before a "neutral decisionmaker" or an "impartial judge." Both courts acknowledged that the hearing officer need not be totally impartial. The learned district judge held, instead, after carefully reviewing the undisputed facts of Mr. Williams' relationship with Mr. Duchesne, and particularly his role as "accuser, witness, and judge," that "the evidence" is "that the plaintiff received an unfair and partial hearing," and that "*[i]n this situation,* due process demands that someone other than [Mr. Williams] conduct the hearing." (Emphasis added.) This court's panel found that the record supported the district court's conclusion that on the undisputed facts of *this* case, the hearing officer's relationship to the plaintiff was so uniquely accusatory and partisan that he was "*too* biased to give Duchesne a fair hearing."

After careful consideration of the briefs and arguments upon rehearing en banc, I continue to be satisfied that the pretermination hearing to which Mr. Duchesne was constitutionally entitled under the Due Process Clause, even if it be only a summary, informal, and peremptory "right of reply" must, nevertheless, be a hearing in which, to paraphrase my colleague, "the supervisory official is [not] *so* biased that the *Loudermill* 'right of reply' process is meaningless."[1] (Emphasis added.) The uncontradicted record proof in this case is that it was.

Consequently, I must respectfully dissent.

---

[1]One searches the Supreme Court's *Loudermill* opinion in vain to find the constitutionally mandated pretermination hearing defined as a mere "right of reply." That characterization of the hearing is this court's creation in its own *Loudermill* opinion, 721 F.2d at 560, and is conspicuously absent from the Supreme Court's opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS JUDGMENT FILED JUNE 20, 1988

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED:
NO. 86-1017 June 20, 1988

HARRY DUCHESNE, Plaintiff-Appellee,

V.

WYLIE L. WILLIAMS, JR. and the
CITY OF INKSTER, a municipal corporation,
Defendants-Appellants.

Before: ENGEL, Chief Judge*; LIVELY, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges.**

JUDGMENT

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs,

THIS CASE came on to be heard and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the district court is reversed, the injunction is vacated and dissolved, and the case is remanded

consistent with this opinion, and for further proceedings.

IT IS FURTHER ORDERED that Defendants-Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of district court, if necessary.

ISSUED AS MANDATE: August 1, 1988
ENTERED BY ORDER OF THE COURT
COSTS: PENDING
Leonard Green, Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
by_____
Deputy Clerk

_____
Clerk

*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.
**The Honorable Ralph B. Guy recused himself from participation in this appeal.

APPENDIX D

UNITED STATES COURT OF APPEALS ORDER FILED JULY 22, 1988

No. 86-1017

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HARRY DUCHESNE, Plaintiff-Appellee,

v.

ORDER

WYLIE L. WILLIAMS, JR.; AND THE CITY OF INKSTER, A MUNICIPAL CORPORATION, Defendants-Appellants

FILED: JUL 22, 1988
LEONARD GREEN, Clerk

The court having received appellee's petition for rehearing of the court's en banc decision, and the petition having been circulated to all active judges of this court, and no judge having favored the suggestion,

It is ORDERED that the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS DECISION DECIDED AND FILED JUNE 16, 1987

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 86-1017

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRY DUCHESNE,
Plaintiff-Appellee,

v.

WYLIE L. WILLIAMS, JR.; and the CITY OF INKSTER, a municipal corporation,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 16, 1987

Before: NELSON and RYAN, Circuit Judges; and ENSLEN, District Judge.*

RYAN, Circuit Judge, delivered the opinion of the court, in which ENSLEN, District Judge, joined. NELSON, Circuit Judge (p. 25), delivered a separate opinion concurring in part and dissenting in part.

RYAN, Circuit Judge. Defendants appeal from two orders setting forth plaintiff's remedies for their failure to provide

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*The Honorable Richard A. Enslen, United States District Court for the Western District of Michigan, sitting by designation.

a fair pre-termination hearing. Defendants contend that plaintiff had no property right in his municipal employment: that, if he had such a right, he received whatever process was due; and that, if he did not, the remedy afforded him exceeded what the Constitution requires.

We affirm.

I.

Plaintiff Duchesne was hired in 1982 as the Chief Building Inspector for the City of Inkster (the City). Something over a year later, in 1983, a dispute developed between Duchesne and defendant Williams, then the Inkster City Manager. Duchesne refused to approve payments for repair work done on the Inkster Ice Arena, stating that the work did not conform to city standards. Williams insisted that the work should be approved. The dispute erupted in public at a September 6, 1983, city council meeting. On September 12, 1983, Duchesne was terminated. He filed suit on September 28, 1983.

Soon thereafter, the parties agreed that Duchesne would continue to be paid until he received a discharge hearing pursuant to § 109.2 of the Building Officials and Code Administrators International, Inc., Basic Building Code (the "BOCA Code"), which the City adopted in 1970.

The City determined that Williams was the "appointing authority" designated by § 109.2 and would act as hearing officer at Duchesne's discharge hearing. Thus, Williams, who had sent the letter of termination, presided over a three-day hearing. The City initially brought fourteen charges against Duchesne, six of which were eventually dropped, alleging various instances of insubordination and neglect of duty. Many of these charges were developed by Williams, who also testified extensively against Duchesne. Duchesne was afforded an opportunity to present evidence and witnesses.

At the conclusion of the hearing, Williams declared that the City had shown cause for Duchesne's termination. A sec-

ond letter of termination was sent on November 18, at which time Duchesne was dropped from the City's payroll.

II.

Many briefs have been filed, and much argument had, in this case. The most important milestones in the litigation, however, were these:

(1) On March 12, 1984, the district court denied defendants' motion for summary judgment. Defendants had argued that Duchesne was terminated for cause and that he had been afforded due process, although no process was due since the BOCA Code provision relied upon had been voided by the Inkster City Charter;

(2) On July 25, 1985, the district court granted partial summary judgment in favor of Duchesne, finding, for a second time, that Duchesne had a property right in continued employment with the City, and also finding, in accordance with the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), which had just been decided, that Duchesne had been deprived of due process;

(3) On September 10, 1985, the district court denied another motion for summary judgment brought by defendants, holding for a third time that Duchesne had a property right in continued employment with the City. This motion was the outcome of new research by defendants, purporting to show that the BOCA Code should never have been construed to mean that Duchesne was the "building official" protected by § 109.2 and that, furthermore, the BOCA Code itself had been repealed in 1983 by Michigan's passage of a new "State Construction Code";

(4) On October 7, 1985, in response to Duchesne's Motion for Determination of Remedy, the district court ordered (a) that a new hearing be held before a neutral hearing officer selected by mutual agreement of the parties, (b) that

Duchesne be reinstated pending the outcome of the new hearing, although the City was not required to recall him to work, and (c) that Duchesne be awarded back pay from the time of his termination;

(5) November 21, 1985, in response to defendants' motion for reconsideration of the previous order, the district court clarified and affirmed its previous order, but modified it by requiring that fifty percent of the back pay awarded be placed in escrow pending resolution of the matter in the event that the defense should later prove mitigation; and

(6) On December 20, 1985, defendants filed notice of this appeal, listing, as the orders appealed from, the district court's orders dated October 7 and November 21, 1985.

III.

Duchesne claims to have a "property interest" in his employment with the City such that his employment may not be terminated unless he is first afforded a constitutionally adequate hearing.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that

> secure certain benefits and that support claims of entitlement to those benefits."

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Duchesne relies upon BOCA Code § 109.2, which provides that "the building official shall not be removed from office except for cause and after full opportunity to be heard." This law plainly creates the sort of "legitimate entitlement" we have held to create a property interest. *See, e.g., Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985). Thus, the dispute in this case has centered upon whether this provision was in force in the City during Duchesne's tenure as Chief Building Inspector and whether the Chief Building Inspector is the "building official" protected by this provision.

Defendants first contended that a City Charter provision, Inkster City Charter § 6.7(b), stating generally that an "administrative officer" shall be appointed by and terminable at the will of the City Manager, takes precedence over the conflicting City ordinance, BOCA § 109.2. The district court rejected this theory on the ground that, because the adoption of a city building code (the BOCA Code or some other) is required by state law, the code in force in Inkster had the force, not of a mere city ordinance, but of state law, which prevails over a conflicting charter provision. Defendants appear to have abandoned the charter provision argument on appeal.

In support of their current explanation of why the BOCA Code does not apply and why the Chief Building Inspector is not the "building official" the BOCA Code protects, defendants present us with a sketchy amalgam of state law, municipal law, and fact. Because this case comes to us on appeal from summary judgment, we must view disputed facts in the light most favorable to appellants. *Crippen v. Kheder*, 741 F.2d 102, 104 (6th Cir. 1984). With this obligation in mind, the relevant circumstances may be summarized as follows:

In 1970, the City adopted the BOCA Code, including § 109.2. The State Construction Code Act of 1972, Mich. Comp. Laws Ann. §§ 125.1501-.1531 (West 1986) (the Act), took effect in 1973. Section 8 of the Act, Mich. Comp. Laws Ann. § 125.1508, set forth procedures whereby local jurisdictions could either elect to exempt themselves from the Act in part (by adopting a building code on their own) or give notice of an intent to continue to administer a building code already in effect. Absent such notice or election, the Act took effect "throughout the state." As will be seen hereafter, Inkster adopted the Act in 1974.

Section 9 of the Act, Mich. Comp. Laws Ann. § 125.1509, set forth the administrative and enforcement mechanisms for the Act. Section 9(1) provided in part:

> "A governmental subdivision may by ordinance assume responsibility for administration and enforcement of this act within its political boundary."

Section 9(2) provided in part:

> "Unless otherwise provided by local law or ordinance, the legislative body of a governmental subdivision responsible for administration and enforcement of this act and the code shall designate an enforcing agency that shall discharge the responsibilities of the governmental subdivision under this act."

Section 9(3) provided:

> "Subject to the other provisions of this act, an enforcing agency shall be any official or agent of a governmental subdivision qualified by experience or training to perform the duties associated with construction code administration and enforcement."

On October 21, 1974, the Inkster City Council passed a resolution adopting "the Michigan Construction Code as promulgated in Act 230 [the state construction code act]."

On December 2, 1974, the City adopted an ordinance, Number 482, the substantive portion of which stated:

> "Pursuant to the provisions of Section 9 of Act 230 of the Public Acts of 1972 (MCL Section 125.1509), the City Manager or his designee, is hereby designated as the enforcing agent to discharge the responsibilities of the City of Inkster under Act 230 of the Public Acts of 1972, State of Michigan. The City of Inkster hereby assumes responsibility for the administration and enforcement of said Act throughout its corporate limits."

The other pertinent portion of the Act is § 4, Mich. Comp. Laws Ann. § 125.1504, which provides for the promulgation of a "state construction code." This code has been promulgated through a process of administrative rulemaking. *See* Mich. Admin. Code Rules 408.30101 *et seq.* The rules applicable at the time Duchesne was hired by the City were filed in 1981. Rule 408.30401 adopts the BOCA Code by reference, including §§ 109.1 and 109.2, but specifically excepting § 109.5, among others. Sections 109.1 and 109.2 provide:

> "109.1 Building official: The department of building inspection is hereby created and the executive official in charge thereof shall be known as the building official.
>
> "109.2 Appointment: The building official shall be appointed by the chief appointing authority of the jurisdiction; and the building official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority."

BOCA § 109.5, excepted from the state construction code, provided:

> "109.5 Qualifications of the building official: To be eligible for appointment, the building official shall

> have had at least five years building experience as a licensed professional engineer or architect, building inspector, contractor or superintendent of building construction. For three years of which experience the building official shall have been in responsible charge of work; and the building official shall be generally informed on good engineering practice in respect to the design and construction of buildings, the basic principles of fire prevention, the accepted requirements for means of egress and the installation of elevators and other service equipment necessary for the health, safety and general welfare of the occupants."

The foregoing are the circumstances proffered by the defense, and yet we fail to see how they could be construed to support defendants' theory of this case. First of all, as has been apparent to all concerned from the start, § 109.2 is the law in the City of Inkster. It therefore appears to be a point of very limited interest here whether the BOCA Code per se, or the BOCA Code as adopted by reference in the state construction code, is the proper source of the provision for our purposes. The City's law in either case prohibits removal from office of "the building official" except for cause and pursuant to a full hearing.

The only point upon which dispute is possible is whether Duchesne, the "Chief Building Inspector" appointed by the City Manager, is the City's "building official." Defendants contend that the City's Ordinance No. 482, whereby the City assumed responsibility for the enforcement of the state construction code act, designated "the City Manager or his designee" as the "enforcing agency" under the Act; defendants then observe that no official designation of any other person to serve as the "enforcing agent" ever took place. Therefore, they conclude, the City Manager (that is, defendant Williams) was still the enforcing agent during the period of Duchesne's employment with the City. Duchesne, they

suggest, was nothing so grand as an "enforcing agent"; rather, he was a mere ministerial official—an "inspector," not an administrator.

Defendants construe § 109.2 to provide that the City Manager, who otherwise serves at the pleasure of the City Council, cannot be terminated except for cause because he is, among other things, the City's "Building Official." Thus, at least insofar as he is a building official, he must be granted a hearing before the "chief appointing authority" of the City, who ordinarily would be himself, but who in this instance, to avoid logical absurdity, must be the City Council.

Neither party has addressed the issue of whether the "enforcing agency" of § 9(2) and (3) of the Act could be a different entity than the "building official" of § 109.2 of the Code. While we are reluctant to decide any issue without briefing, especially an issue of state law, equating the two terms does appear to be reasonable, and we shall assume, for our purposes here, that this construction is correct.

We must assume also, for our purposes here, that defendants correctly state that the City Manager was designated by ordinance to be the City's enforcing agent/building official. Nonetheless, we hold as a matter of law that defendants' theory cannot be correct. We arrive at this conclusion to some extent because of our reluctance to reverse a federal judge with long experience interpreting Michigan law, but to a greater extent because we simply agree with his conclusion. In *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942), a diversity case involving Michigan conflicts of law rules and insurance law, the Court's entire reasoning was contained in a single paragraph:

> "No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon

> purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

Id. at 281.

Even if no deference were due to the district court here, however, we consider that court's reasoning persuasive and that of the defendants to border on the absurd. As the district court has observed, the State Construction Code Act, upon which defendants rely, specifically provides that the enforcing agency under that Act "shall be any official or agent of a governmental subdivision qualified by experience or training to perform the duties associated with construction code administration and enforcement." Mich. Comp. Laws Ann. § 125.1509(3). Thus, although the state construction code does not contain BOCA Code § 109.5, setting forth the "Qualifications of the building official," the Act itself already makes clear that the enforcing agency is to be qualified as a construction code administrator/enforcer. It is undisputed that Duchesne is so qualified and City Manager Williams is not.

Furthermore, BOCA Code § 109.1 states that the building official is the "executive official in charge" of the "department of building inspection." It is hard to avoid the conclusion that an individual named to be the "Chief Building Inspector" is expected to be in charge of the department of building inspection, insofar as such a department may be said to exist.

Finally, we are unimpressed by the absence of an official designation of the "Chief Building Inspector" as the "building official." When the City Manager appointed Duchesne as Chief Building Inspector, this constituted a "designation" of an appropriately qualified official to be in charge of building inspection for the City. Under the applicable laws, bestowing the title of "Building Official" upon this individual instead of the title "Chief Building Inspector" would not have made the intent or the effect of this act any more clear.

The purpose of § 109.2 is to insulate the building official from political pressures to ensure, to the extent possible, that decisions affecting public safety are made by an official who is not only technically qualified but disinterested and objective. Accordingly, this official may be removed from office for incompetence or dereliction of duty, but not for making decisions which displease those who are running local government. It would be meaningless, and indeed destructive of this purpose, to apply this provision, not to the inspector himself, but to the man who oversees all of the City's operations.

In construing the due process clause to protect, as property, intangible "entitlements" such as the one at issue here, the courts have necessarily tended to think of property as a social reality more than a physical fact. Property is a matter of "understandings that stem from an independent source such as state law," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), rather than simply a matter of what state law dictates. Even if there were more merit to defendants' legal arguments, we would be hard put to say, on these facts, that § 109.2 did not give rise to an understanding that Duchesne, as Chief Building Inspector, was entitled to be removed from office only for cause and after a fair hearing.

We conclude that Duchesne had a property interest in his employment, created by § 109.2 of the City's construction code.

IV.

We must next consider whether Duchesne received the process due him. The district court decided that Duchesne's termination hearing was constitutionally inadequate because it lacked an impartial decisionmaker. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). In the district court's view, the pre-existing animosity between Wil-

liams and Duchesne, and the fact that it was Williams who initially fired Duchesne, who developed many of the charges against Duchesne, who testified against Duchesne at the hearing, and who thereafter weighed the evidence and decided that it supported Duchesne's termination, sufficed to destroy the fairness of the termination hearing.

We recognize that an employment termination hearing is ordinarily presided over by a decisionmaker with at least some connection with the employer, if not a broad shared interest. It is not constitutionally required that the decisionmaker be absolutely impartial. In *Hortonville Joint School District v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), the Supreme Court held that striking teachers' termination hearings before the same body against whom they were striking, the local school board, and with whom the teachers bargained collectively over the terms of their employment, were not constitutionally invalid. The Court reasoned that "the teachers did not show, and the Wisconsin courts did not find, that the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest, and there is nothing in the record to support charges of personal animosity." *Id.* at 491-92. The Court also stated:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not ... disqualify a decisionmaker. Withrow v Larkin, 421 US 35, 47, 43 L Ed 2d 712, 95 S Ct 1456 (1975); FTC v Cement Institute, 333 US 683, 700-703, 92 L Ed 1010, 68 S Ct 793 (1948). Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' United States v Morgan, 313 US 409, 421, 85 L Ed 1429, 61 S Ct 999 (1941); see also FTC v Cement Institute, supra, at 701, 92 L Ed 1010, 68 S Ct 793."

Id. at 493. After weighing the interests involved, the Court concluded that the teachers had "failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of federal due process." *Id.* at 496.

We also recognize that, under *Hortonville*, a less than impartial decisionmaker may be tolerable if there are no contested issues of fact to be resolved by that decisionmaker. In *Kendall v. Board of Education*, 627 F.2d 1 (6th Cir. 1980), this court held that a school board's pre-termination grievance procedure was constitutionally inadequate because the teacher whose contract was terminated

> "was compelled to appear before the same administrators who had investigated the incidents and recommended her dismissal. Since factfinding on the accusations was necessary, due process requires that the same administrators who investigated the matter not determine her guilt or innocence."

Id. at 5. Defendants here seek to apply this principle by suggesting that, when Williams acted as hearing officer at Duchesne's pre-termination hearing, he was not reviewing his own previous decision to terminate Duchesne, but instead conducting a de novo inquiry into the facts. This argument refutes itself. No characterization of the nature of the hearing can alter the fact that Williams was assigned to conduct a factual inquiry into the very same incidents he had previously investigated and acted upon.

Furthermore, there is no construction of the facts of this case that could support the view that Williams was not too biased to give Duchesne a fair hearing. Even if he is accorded "the presumption of honesty and integrity in policymakers with decisionmaking power," *Hortonville*, 426 U.S. at 497, the record clearly shows the existence of personal animosity between Williams and Duchesne such that Williams' subsequent impartiality was, at a minimum, suspect. *Cf. Taylor*

v. Hays, 418 U.S. 488, 501 (1974). This, taken together with Williams' in-depth involvement in every stage of the proceedings, forbids the conclusion that Williams was a suitable hearing officer. Williams was involved in some of the incidents that formed the basis for Duchesne's termination, and he was principally responsible for accusing, trying, and deciding the issues at Duchesne's hearing. Under the circumstances, the hearing provided to Duchesne was constitutionally deficient.

Defendants also contend that Duchesne must have received all the process due him, because he received the benefit of precisely those procedures set forth in the statute granting him a property right in his employment, that is, a "full opportunity to be heard on specific and relevant charges" prior to his termination, before the "chief appointing authority of the jurisdiction." BOCA Code § 109.2. This theory has been squarely rejected by the Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

Loudermill, which affirmed the opinion of this court in two consolidated cases, *Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983), involved public employees who were provided with a statutory hearing prior to their termination. To the employees' argument that the hearings were constitutionally deficient, the employers responded that the property right afforded to the employees was "defined by, and conditioned on, the legislature's choice of procedures for its deprivation." 84 L. Ed. 2d at 502. While the Court acknowledged that the employers' view had its genesis in a plurality opinion of the Court itself, *Arnett v. Kennedy*, 416 U.S. 134 (1974), and had been approved in various minority opinions since that time, the Court has "clearly rejected" that view in recent years:

> "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of sub-

> stance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process, 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' "

84 L. Ed. 2d at 503. *Loudermill* clearly forecloses defendant's argument that Duchesne received all the process due him simply because his termination hearing met the literal requirements of BOCA Code § 109.2

V.

The remaining question is whether the district court had the power to order the relief it did: a new hearing before a mutually agreed-upon neutral hearing officer, reinstatement pending this hearing, and back pay.

There should be no quarrel over the appropriateness of ordering a new hearing. While not the only feasible approach, this is the most direct and efficient procedure for remedying any defects in the original hearing. Furthermore, as we have stated previously, although a perfectly neutral decisionmaker is not always vital to due process, it was reasonable here to order that the hearing officer be chosen from among those qualified individuals who have no prior connection with the matter, because the defect in the original hearing was the partiality of the individual who would otherwise serve as the hearing officer. Defendants contend that the court should have appointed a hearing officer, rather than leaving these bitterly adversarial parties, who have yet to agree upon anything, to work together in selecting a hearing officer. We are unimpressed by defendants' bare allegations that their adver-

sary will necessarily strive to thwart the court's order. In fact, the record suggests that it is defendants themselves who are responsible for the delay in arranging the new hearing.

Defendants object to the subsidiary relief ordered, however, which essentially requires Duchesne to be paid his salary and benefits from the date of his termination until the conclusion of the new hearing. Defendants point out that this relief has the effect of awarding damages to which Duchesne has proven no entitlement, because he has not yet shown that he was terminated without cause. If the hearing is held, and an impartial hearing officer determines that the City had good cause to terminate Duchesne, then the original decision was procedurally flawed but substantively correct, and any damages awarded to remedy the substantive outcome—Duchesne's termination—will have been proven unjustified.

In *Carey v. Piphus*, 435 U.S. 247 (1978), students who were suspended from school sought to recover substantial nonpunitive damages on the theory that, even if their suspensions had been justifiable, they were entitled to damages for the denial of due process itself. The Court held that, in the absence of proof of actual injury caused by the denial of due process, the students were entitled only to nominal damages. As for the injury suffered not merely from the lack of due process but from the consequent suspension from school, the Court stated:

> "In this case, the Court of Appeals held that if petitioners can prove on remand that '[respondents] would have been suspended even if a proper hearing had been held,' 545 F2d, at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspension.
>
> ". . . . The court suggested that in such circumstances. an award of damages for injuries caused by

> the suspensions would constitute a windfall, rather than compensation. to respondents .... We do not understand the parties to disagree with this conclusion. Nor do we."[15]

> "[15] A few courts appear to have taken a contrary view in cases where public employees holding property interests in their jobs were discharged with cause but without procedural due process."

Id. at 260 (citations omitted).

We followed *Carey* in *Kendall v. Board of Education*, 627 F.2d 1 (6th Cir. 1980), reasoning that the teacher in that case suffered two injuries, when she was terminated without due process, for which she could seek relief: "the deprivation of a contract right without due process and the denial of due process itself." *Id.* at 5. The district court had ordered the school board to pay damages, apparently with only the first injury in mind. We determined that the damage award had not been adequately supported by proof:

> "The Board contests the award of damages to Kendall. Kendall may be compensated for an injury resulting from the denial of procedural due process. *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In *Carey*, the Supreme Court expressly declined to adopt a 'per se' standard for entitlement to damages. Therefore, we hold that Kendall is not entitled to relief for the deprivation of her contract right if the Board established that she would have been discharged even if a proper hearing had been held. *Id.* at 260, 98 S.Ct. at 1050. The district court granted Kendall damages in the amount of her salary under the unpaid portion of her employment contract. Apparently, the district court ordered relief only for the deprivation of the contract right. However, no findings were made on

> whether or not the Board met its burden of providing [*sic*] that Kendall would have been dismissed even if a proper hearing had been conducted. Consequently, further factfinding is necessary to justify the award of damages to Kendall.
>
> "On remand, the district court should determine, if Kendall raises the issue, whether she proved any actual injury, such as lost employment opportunities or mental anguish, which was directly caused by the denial of procedural due process."

Id. at 6 (footnotes omitted). In this case, as in *Kendall,* there has as yet been no reliable determination of the merits of the plaintiff's termination.

Carey and *Kendall,* however, are not directly applicable here. The key distinction between those pre-*Loudermill* cases and this one is that they involved plaintiffs who claimed a right to money damages for the deprivation of due process before they had proven any injury from that deprivation. In *Carey,* the students sought to avoid the difficult task of quantifying the injury attributable to missing school. In *Kendall,* the parties stipulated that the school board would pay damages in lieu of any court-ordered new hearing. In this case, on the other hand, the principal remedy ordered was a new hearing: equitable, not legal, relief. Evidently, the district court also viewed the other remedies ordered as equitable in nature and designed to support enforcement of the principal remedy. Duchesne was reinstated "pending the outcome of the hearing" and awarded sufficient back pay to make this reinstatement retroactive from the date of the original hearing.

In ordering this relief, the district court relied upon the Supreme Court decision in *Loudermill,* which was decided while this case was before the district court. *Loudermill* focused upon the second step of the same analysis we have undertaken in this case, that is, what process is due to a public

employee with a property interest in his employment. The specific question raised in *Loudermill* was whether the process due upon termination is defined by the statute creating the interest. Answering this question in the negative, the Court did not directly address the issue of what relief a court should order for a plaintiff who has been denied the process due.

The *Loudermill* opinion is quite clear on what process is due, but not on what the appropriate remedy is for its denial. While the Court did determine that a pre-termination hearing is constitutionally required, it disposed of the case by affirming this court's decision and remanding to the district court. Our opinion had concluded:

> "We vacate ... that part of the district court's judgment that dismissed the pre-termination procedural due process claims. Upon remand, appellants may seek to prove that they sustained damages stemming from the state's failure to provide any pre-termination due process."

Loudermill v. Cleveland Board of Education, 721 F.2d 550, 564 (6th Cir. 1983), *aff'd*, 84 L. Ed. 2d 494 (1985). Thus, the Supreme Court's remand for "further proceedings consistent with" the *Loudermill* opinion, 84 L. Ed. 2d at 507, could be taken to mean either (1) that the plaintiffs were entitled to new pre-termination hearings coupled with whatever ancillary relief, including reinstatement and back pay, is necessary to preserve the pre-termination status quo, or (2) that the plaintiffs were merely entitled to damages for the denial of a pre-termination hearing and that they had no right to more than nominal damages if the employer can show, either at a new hearing or at trial, that plaintiffs would have been terminated after a fair hearing. In other words, it is not clear from the *Loudermill* opinion whether the Court intended to contravene or undercut the dicta from *Carey* that became the law of this circuit in *Kendall*.

Loudermill has been read both ways. In *Davis v. Alabama State University*, 613 F. Supp. 134 (M.D. Ala. 1985), the court found that the procedures followed in plaintiff's discharge violated due process and issued an injunction requiring that he be afforded new notice and opportunity to respond. Citing *Carey*, however, the court held that back pay and reinstatement could not be ordered unless the new hearing disclosed that the discharge was without cause. Similarly, in *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1985), the court relied upon *Loudermill* to establish what process was due, but cited *Carey* for the proposition that:

> "Where there has been a *justified* deprivation of a protected interest through deficient procedures, the injury caused by the justified loss is not properly compensable under section 1983."

Id. at 1265 (emphasis added).

It has been more common, however, to read *Loudermill* as not only prescribing what process is due, but as altering the law on what relief a plaintiff is entitled to once a denial of due process is demonstrated. For example, in *Hopkins v. City of Wilmington*, 615 F. Supp. 1455 (D. Del. 1985), the court held that the plaintiff "would have been discharged even if proper procedures had been followed," *id.* at 1462, but nonetheless awarded back pay "for the period during which plaintiff was suspended without notice and an opportunity to be heard." *Id.* at 1464. Similarly, in *Moynihan v. Hickey*, 627 F. Supp. 466 (D.N.H. 1986), the court had not decided the merits of plaintiffs' discharge, but entered a preliminary injunction ordering that the "purported discharge" of plaintiffs be held in abeyance until a proper pretermination hearing was held. In the meantime, the court ordered reinstatement and the payment to the employees of "any payments of salary or benefits due and owing them." *Id.* at 475.

Finally, in *Hogue v. Clinton*, 791 F.2d 1318 (8th Cir.), *cert. denied*, 93 L. Ed. 2d 704 (1986), the court held that the plain-

tiff did not have a property interest in his employment, but that he might have been deprived of a liberty interest by the employer's action. As for the appropriate remedy for the deprivation of the liberty interest, the court noted:

> "Unless [the plaintiff] can establish that he suffered actual injury due to the failure to hold a pretermination name clearing hearing, we think an award of anything but nominal damages would be a windfall, not compensation."

Id. at 1323 (citing *Carey*). Chief Judge Lay, however, dissented from the court's holding that the plaintiff did not have a property interest in his employment, and therefore explained what relief he considered appropriate for the deprivation of that interest without due process.

Judge Lay distinguished between the relief due when the deprivation of a *liberty* interest without due process is shown and the relief due when the interest in question is a *property* interest. While concurring in the majority's holding with regard to the former, therefore, he carefully distinguished *Carey*, which involved suspension from school—an action "more in the nature of a deprivation of liberty than property," *id.* at 1327—from cases such as the instant one, involving the deprivation of a public employee's property interest in employment. A "name clearing hearing" is not concerned with the employee's entitlement to continued employment, but with preserving reputation, and the damages issues raised by infringements of these two distinct rights are quite different.

Judge Lay explained the effect of *Loudermill* on *Carey* this way:

> "There is language in *Carey* that suggests that the Court might not have recognized this distinction at the time *Carey* was decided. At footnote 15 of the *Carey* decision, the Court notes with disfavor several cases from the fourth and fifth circuits that

awarded a backpay measure of damages for public employees discharged for cause but without procedural due process. *Carey*, 435 U.S. at 260 n. 15, 98 S.Ct. at 1050 n. 15. This language is dicta only, and seemingly is put to rest by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The unequivocal message of *Loudermill* is that due process 'requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his [or her] employment.' *Loudermill*, 105 S.Ct. at 1493 *quoting Roth*, 408 U.S. at 569-70, 92 S.Ct. at 2705. This rule clearly imposes on public employers an obligation to retain an employee on the payroll until a pretermination hearing satisfying the *Loudermill* notice and hearing requirement is conducted. Significantly, the Court observed 'in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay*.' *Loudermill*, 105 S.Ct. at 1495 (footnote omitted, emphasis added). To effectively bar recovery of back pay damages by the application of the *Carey* rules would make a mockery of the requirement of a pretermination hearing since, without the deterrent of a back pay award, no incentive remains for the employer to do anything more than provide only a post-termination hearing.

".... I would thus hold that an employee who proves a property deprivation based on having been terminated without a *Loudermill* pretermination hearing be awarded back pay from the time of discharge until a proper hearing is held."

Id. at 1328-29 (footnotes omitted).

We cannot say that the district court abused its discretion, and that after all is our standard of review, in reading

Loudermill in this same manner and ordering Duchesne's reinstatement pending a fair hearing on the merits of his termination. Furthermore, the district court did not abuse its discretion in determining that back pay should be awarded to preserve the status quo until the new hearing could be held and to encourage the employer to cooperate in holding that hearing promptly.

VI.

In his appellate brief, Duchesne attempts to persuade us that the orders appealed from are not appealable under 28 U.S.C. § 1292(a)(1) because they are not injunctions. We find this argument remarkably ill-advised, in that, if it persuaded us, the district court would be required by *Carey* to invalidate the award of reinstatement and back pay pending the new hearing. Fortunately for Duchesne, however, and consistently with our foregoing analysis of the relief ordered in light of *Loudermill*, we consider the reinstatement and back pay orders to be ancillary to the plainly injunctive new hearing order. Accordingly, we reject Duchesne's contention that the relief ordered was in the nature of specific performance rather than an appealable injunction.

VII.

Defendants, for their part, contend that the injunctive relief was unjustified in the absence of any finding by the district court that Duchesne was likely to prevail on the merits or that he would be irreparably harmed in the absence of the injunction. We reject this contention as well.

Resolution of these issues is implicit in the district court's reliance on *Loudermill*, where the Court stated that "the right to a hearing does not depend on a demonstration of certain success." 84 L. Ed. 2d at 503. Indeed, one of the plaintiffs in *Loudermill* clearly had a fairly weak case on the merits. *See id.* at 505. Furthermore, the *Loudermill* Court stressed "the severity of depriving a person of the means of

livelihood" and expressly held that "governmental interests in immediate termination do not justify termination before a constitutionally sufficient hearing has been held." *Id.* at 504-05.

> "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."

11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948 at 440 (1973).

The prerequisites for injunctive relief were adequately established here.

VIII.

We hold that it is appropriate for a district court to order that a plaintiff who has been deprived of a constitutionally protected interest in employment without due process be reinstated and awarded back pay pending constitutionally sufficient notice and the opportunity to be heard.

AFFIRMED.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. I agree that the plaintiff had a property right in his municipal employment, and I agree also that the procedure followed in the termination of the employment failed to pass constitutional muster. I must dissent, however, from the conclusion that even if it is ultimately established that there was good cause for the discharge, the taxpayers of the City of Inkster may still be required to give the plaintiff something like four years' back pay.

I see no logical relationship between the quantum of any damages the plaintiff may have sustained solely by reason of the procedural irregularities attendant on his discharge and the amount of money that he would have earned had he been kept on the payroll from the date he ought to have been discharged to the date on which it may ultimately be determined that there was good cause for the discharge. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), as I read it, does not require that compensation for a proper discharge effected in an improper manner be calculated as if there were no just cause for the discharge itself. It may be true in theory that to award punitive damages—which is what the court, in effect, has sanctioned—will give municipalities a greater incentive to hold proper pretermination hearings, but municipalities are not inherently lawless bodies, the resources of their taxpayers are not unlimited, and the need for such an incentive escapes me. I do not think an employee who does not belong on the public payroll, *ex hypothesi,* ought to be allowed to tap the public fisc for a sum of money equal to what he would have received if he did.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MEMORANDUM OPINION AND ORDER DATED
JULY 25,1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARRY DUCHESNE,

Plaintiff, CIVIL NO. 83-CV-4152-DT
HON. PHILIP PRATT

v.

WILEY L. WILLIAMS, JR., and
the City of INKSTER,

Defendants.
_____/

MEMORANDUM OPINION & ORDER

This case concerns the termination of plaintiff, Harry DuChesne, from his position as Chief Building Inspector for the City of Inkster. Plaintiff was hired in that position on April 26, 1982. After some apparent disagreement between plaintiff and then-City Manager Wylie Williams, Jr., plaintiff was termination on September 12, 1983.

After receiving his termination letter, plaintiff on September 28, 1983, started this lawsuit. The first amended

complaint alleges that plaintiff's first and fourteenth amendment rights were violated, as well as his rights under 42 U.S.C. § 1983. Counts II through IV claim violations of the Michigan Constitution, breach of contract, and intentional interference with contractual and advantageous business relations.

What follows is a brief description of the undisputed facts leading up to plaintiff's discharge. The evidence indicates that there was a disagreement between Mr. Williams and plaintiff over construction bills for the repair of the Inkster Ice Arena. Plaintiff apparently refused to approve the payments because it was his opinion that the work did not conform to city standards. Mr. Williams was apparently urging the approval of the payments. At the September 6, 1983 city council meeting, plaintiff was questioned

by council members concerning his opinion of the ice rink work. He reiterated his position that the bills should not be paid despite the insistence of Mr. Williams.

After his termination, the city agreed to give plaintiff a discharge hearing in accordance with BOCA Code Section 109.2. That section provides:

> The building official shall be appointed by the chief appointing authority of the jurisdiction; and the building official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority.

Under this section, the appointing authority for plaintiff's position is the city manager, Mr. Williams, the person who sent plaintiff the termination letter. The section provides that the same person, the appointing authority, is to hear the relevant charges prior to discharging the building official.

In accord with this section, plaintiff was given a list of charges against him which alleged insubordination and neglect of duty. Fourteen charges were initially brought against plaintiff, but six were eventually dismissed by stipulation of the parties. Of the eight remaining charges, Mr. Williams played the key role in developing and formulating the accusations against plaintiff. A three-day termination hearing was then conducted with Mr. Williams acting as the hearing officer. During the hearing, both sides were given the opportunity to present evidence and witnesses. At its conclusion, Mr. Williams determined that there was "cause" for plaintiff's termination.

This matter is now before the court on defendant's motion for summary judgment and plaintiff's motion for partial summary judgment. The court is mindful of the fact

that civil rights suits must be carefully scrutinized. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972). It is only proper to grant a summary judgment motion when there is no genuine issue of a material fact, and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The court must construe the evidence together with all inferences in the light most favorable to the party opposing the motion. Watkins v. Northwestern Ohio Tractor Pullers Ass'n., 630 F.2d 1155 (6th Cir. 1980).

Defendants set forth several grounds for their summary judgment motion. They argue that 1) plaintiff was afforded a constitutionally valid due process hearing prior to his termination; 2) plaintiff was properly terminated for cause; and 3) plaintiff has failed to state a claim upon which relief can be granted for civil

rights violations under 42 U.S.C. § 1983 as to the City of Inkster.[1] Plaintiff's partial summary judgment motion is based on the argument that the termination did not comport with due process.[2]

II.

The first issue to consider is whether plaintiff's termination hearing comported with notions of due process. Defendants take the position that it

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[1]Plaintiff's § 1983 claim is challenged by defendant in its amended motion for summary judgment filed on January 31, 1985. Although defendant captions it as a Rule 56 motion, it is more appropriately treated under Rule 12(b)(6), Fed.R.Civ.P.

[2]In regard to the due process argument advanced by both plaintiff and defendant, the court ordered supplementary briefs in light of the U.S. Supreme Court's opinion in Cleveland Board of Education v. Loudermill, et al., No. 83-1362 (March 19, 1985). The parties have complied with the additional briefing order of the court.

fully complied with the provisions of BOCA Section 109.2 in conducting the termination hearings, and, accordingly, gave plaintiff all due process that should have been accorded him. On the other hand, plaintiff states that the initial termination decision was made by Mr. Williams, and then Mr. Williams also served as the chief hearing officer during the termination proceedings. At the hearings, Mr. Williams testified extensively about plaintiff's performance. See Hearing Transcript, October 9, 1983, October 17, 1983.[3] Under these circumstances, plaintiff argues that he was deprived of any meaningful termination hearing because the hearing

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[3]For example, Mr. Williams testified that he "created and developed" many of the charges brought against plaintiff. Hearing, October 6, 1985 at pp. 136-67.

officer was not an impartial

decision-maker, but rather a biased

participant. Plaintiff argues:

> Defendant Williams had already prejudged the merits of the case. He had already made up his mind that Plaintiff's conduct warranted dismissal, as evidenced by his original termination letter to Plaintiff dated September 12, 1983. The subsequent hearing was simply a sham and pretense, conducted to give the appearance of complying with the law when the outcome was predetermined. Defendant Williams was in the untenable position of reviewing his own prior decision and

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Furthermore, the hearing transcript indicates that Mr. Williams testified extensively about plaintiff's performance as Chief Building Inspector. In particular, Mr. Williams testified about plaintiff's alleged failure to complete certain administrative duties in a timely fashion. See Hearing, October 17, 1985 at p. 98.

Mr. Williams' testimony against plaintiff makes abundantly clear that he was involved in the actual investigating, accusing, hearing and judging of plaintiff's performance.

> having to weight his own credibility on cross-examination. The ingredients simply do not add up to a fair and impartial hearing required by the Constitution.

In response to this argument, defendant attempts to justify Mr. Williams' conduct by stating that "Defendant Williams was not reviewing the decision he had previously made, but was making his own determination."

It is settled that plaintiff's due process claim is contingent on having a property right in continued employment with the City of Inkster. Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972). The Inkster statute clearly created such a right as this court noted in ruling on defendant's earlier motion for summary judgment. See also Paul v. Davis, 424 U.S. 693 (1976).

Defendant, however, argues that the extent of the due process which plaintiff

must be accorded is contained in the statute itself. Aside from stating that plaintiff could only be terminated for cause, the section provides for a "full opportunity to be heard on specific and relevant charges by and before the appointing authority." Defendant's argument is that the procedures contained in the section were adhered to, and that requiring any further procedures would give plaintiff more due process that he was entitled to under the statute. See Arnett v. Kennedy, 416 U.S. 134 (1974).

This position finds little support in the caselaw, especially in light of the Court's recent decision in Cleveland Board of Education v. Loudermill, et al., discussed more fully infra. In Arnett v. Kennedy, 416 U.S. 134 (1974), a discharged federal employee challenged his termination procedures. A plurality said when a

statute that confers a substantive right also sets forth the procedure for enforcing the right, the two must stand together. The plurality held:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee [discharged employee] must take the bitter with the sweet.

416 U.S. at 152-54.

Although three Justices in Arnett agreed with this position, the other six voted against it. In fact, several recent decisions make clear that defendant's position is untenable. Loudermill discussed infra, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (state legislature could not simply define procedures to be followed in enforcing entitlement state statute created), Vitek v. Jones, 445 U.S. 480 (1980) (due process procedures not diminished because state specifies own

procedures that it may consider adequate under the circumstances.

In Loudermill, 53 U.S.L.W. 4306 (March 19, 1985), the U.S. Supreme Court spoke to the question now before this court. That case involved two consolidated cases in which public employees were discharged from their jobs without being afforded an opportunity to respond to the charges or challenge their dismissals. Involved was an Ohio statute which provided that classified civil servants could only be terminated for cause and may obtain administrative review if discharged. Ohio Rev. Code Ann § 124.34.

In holding that the Ohio statute created a property right in the employees' continued employment, the Court discredited the Arnett-type approach defendant wants this court to follow. The Court said that such a view "misconceives the

constitutional guarantee." Due process provides that some rights such as the property right at issue here cannot be deprived unless constitutionally adequate procedures are followed. The court held:

> While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Thus, simply because the City of Inkster may have complied with the requirements of BOCA 109.2, it does not follow that plaintiff received a hearing which can withstand scrutiny under the due process clause.

In setting out the requirements of "what process is due," see Morrissey v. Brewer, 408 U.S. 471, 481 (1972), the Loudermill Court explained:

> The essential requirements of due process...are notice and an opportunity to respond. The opportunity to present reasons,

> either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

This holding is premised on the Court's evaluation of the interests involved in conducting such a hearing. These include the private interest in continued employment, the government interest in expedient removal of "unsatisfactory employees and avoiding administrative burdens, and, of course, the risk of a mistaken termination."

As noted supra, plaintiff's challenge to a termination hearing stems from the fact that Mr. Williams was the one who actually terminated him initially, who sat as the chief hearing officer during the

termination hearing, and who also testified against plaintiff during the hearing. In essence, plaintiff argues that Williams acted as accuser, jury, and judge. Defendant attempts to counter this contention by arguing that "Defendant Williams was not reviewing the decision he had previously made, but was making his own determination." Presumably, defendant means that Williams was not simply reconsidering his initial termination decision, but was considering facts anew at the hearing in light of any new information or evidence presented.

A precept of due process is the opportunity to be heard "in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319 (1976). Within this framework is the requirement that judges or decision-makers who may be biased should be disqualified from the process in order to insure

compliance with due process. Withrow v. Larkin, 421 U.S. 35 (1975). There is ample support for the proposition that there is an intolerable constitutional risk of a due process violation when a decision-maker might have prejudged the situation because of his prior involvement as an accuser, investigator, fact finder, or initial decision-maker.

Illustrative of these cases is In re Murchison, 349 U.S. 133 (1955), in which the Supreme Court held that a one-man grand juror could not conduct contempt hearings for those witnesses who had appeared before him and were charged with perjury and refusal to answer questions. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that due process mandated that a welfare recipient be given an evidentiary hearing before her benefits are terminated. The Court said "an impartial

decision-maker is essential." Further, the Court said:

> [P]rior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision-maker. He should not, however, have participated in making the determination under review.

397 U.S. at 271.

Likewise, in Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that a parolee was entitled to a pre-revocation hearing before a "neutral and detached" board. The Court felt that such a hearing must be before "someone not directly involved in the case." 408 U.S. at 485.

There are several other cases which merit further discussion. In Withrow v. Larkin, 421 U.S. 35 (1975), a state medical examining board investigates, issues findings about a physician's possible violations of applicable law, and then determines itself whether the laws have actually been violated. In relevant

portion, the Court said that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation." 421 U.S. at 41.

The Withrow Court distinguished both Morrissey and Goldberg as involving situations in which an initial decision is reviewed and the decision-maker must be "other than the one who made the decision under review." Id. at 58. In Withrow, the licensing board is not put in a position of reviewing its initial decision, such as in the cases just discussed, but decides two separate questions: is there probable cause that a law has been violated and, if so, it decides whether there has been a violation after a complete evidentiary hearing.

Furthermore, in Hortonville Joint School District No. 1 v. Hortonville

Education Assoc., 426 U.S. 482, teacher's union members went on strike which was illegal under state law. The local board of education conducted disciplinary hearings, and then voted to terminated the contracts of the striking teachers. This was done, however, after notice and a hearing. The Court stated that the board was not so impartial as to offend due process.

> Since the teachers admitted that they were engaged in a work stoppage, there was no possibility of an erroneous factual determination on this critical threshold issue.
>
> ....
>
> It was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy.

426 U.S. at 494-95. The key distinction between Hortonville and the other cases is the necessity of a factual adjudication by an impartial judge or decision-maker. This was not called for in Hortonville.

One further case is helpful. In Kendall v. Board of Education, 627 F.2d 1 (6th Cir. 1980), a public school teacher challenged her discharge on due process grounds. Said the Sixth Circuit:

> The Board did not provide Kendall with due process, because she was never given a fair and impartial hearing. Even if we assume a grievance procedure would satisfy the requirement for a hearing on the charges the Board's grievance procedure was deficient because Kendall was compelled to appear before the same administrators who had investigated the incidents and recommended her dismissal. Since factfinding on the accusation was necessary, due process requires that the same administrators who investigated the matter not determine her guilt or innocence.

627 F.2d at 5.

Against this backdrop, the issue becomes whether Mr. Williams' involvement at all stages of the termination process is such that due process has been violated. As plaintiff's supervisor, it was Mr. Williams' decision to fire plaintiff from

his position with the city. At the termination hearing, Mr. Williams was the hearing officer. In addition, Mr. Williams testified extensively about the charges against the plaintiff, as well as to the facts underlying the charges. It was also Mr. Williams' final determination that plaintiff was fired for cause.

Under these facts, it is clear that plaintiff's due process right to a fair and meaningful termination hearing have been violated. Not only did Mr. Williams act to terminate the plaintiff, but he also reviewed his termination decision and, in essence, affirmed it. Mr. Williams acted as accuser, witness, and judge. Such a process cannot withstand scrutiny under the due process clause.

What transpired in the present case is precisely the situation discussed in Kendall, 627 F.2d 1. There is no evidence

other than that plaintiff received an unfair and partial hearing before Mr. Williams. Plaintiff was forced to appear before the same man who terminated him and investigated the charges against him. In this situation, due process demands that someone other than the initial factfinder and accuser pass upon or review those same determinations. Accordingly, to the extent that due process violations are alleged based on t he termination hearings, plaintiff's motion for partial summary judgment is granted, and defendant's denied.

III.

Defendants also move for summary judgment based on the fact that plaintiff was terminated for cause. The court, however, need not pass on this question because the proceedings leading up to this case do not stand under due process requirements.

IV.

Additionally, defendants move to dismiss plaintiff's claims under 42 U.S.C. § 1983 for failure to state a claim upon which relief can be granted. This is directed at count I of plaintiff's amended complaint. As against the City of Inkster, defendant argues that plaintiff has failed to state a section 1983 claim "by failing to allege with specificity overt acts which formed a policy, custom or persistent practice which the City executed and which directly caused a deprivation of constitutional rights of the plaintiff." Furthermore, defendant claims that there is no "affirmative link" between the alleged misconduct here and any plan or policy of the city's.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Supreme Court held that a local government can be

sued for monetary relief under section 1983 only if the action that is alleged to be unconstitutional implements or executes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the officers of the corporation or has been taken pursuant to governmental "'custom' even though such a custom has not received formal approval through the body's official decision-making channels." 436 U.S. at 690-91.

Defendant urges that Monell precludes plaintiff from recovering based solely on a respondeat superior theory. This is correct. Monell, 436 U.S. at 691-94. Plaintiff, however, does not appear to be basing his claim on respondeat superior. Instead, plaintiff is apparently claiming that Mr. Williams' actions, as a high-ranking city official, constituted the policy or custom of the City of Inkster.

The facts as alleged in the plaintiff's amended complaint support this conclusion at least at this stage of the lawsuit. The Inkster City Council was apparently aware of plaintiff's grievance throughout the process, See First Amended Complaint, § 15-17, and in fact refused plaintiff's request for reinstatement.

Construing the available facts in a light most favorable to the plaintiff, as this court must at this juncture, defendant's motion to dismiss must be denied. From all indications, the action or inaction of both the city manager and city council under these circumstances can be nothing but the policy of the City of Inkster. See Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983), Kingsville Independent School District v. Cooper, 611 F. 2d 1109 (5th Cir. 1980), Moore v. Tangipahoa Parish School Board, 594 F.2d

489 (5th Cir. 1979). Accordingly, defendant's motion to dismiss the section 1983 claim is DENIED.

IT IS SO ORDERED.

PHILIP PRATT
UNITED STATES DISTRICT JUDGE

Dated: 7/25/85

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

HARRY DuCHESNE, PETITIONER

v.

WYLIE WILLIAMS, JR. AND THE CITY OF INKSTER

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

Susan E. Morrison, being first duly sworn, deposes and says that on the 20th day of October, 1988, she served a copy of Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit upon

Marilyn A. Madorsky, 4000 Town Center, Suite 1240, Southfield, MI 48075

Milton Spokojny, 6735 Telegraph Road, Ste. 320, Birmingham, MI

by depositing same in a well-sealed envelope with the proper postage fully prepaid, addressed to the aforsaid at the above

address, and depositing same in a mailbox of the United States Post Office.

Susan E. Morrison

SUSAN E. MORRISON

Subscribed and sworn to before me
this 20th day of October, 1988.

Susan J. Friedman

Susan J. Friedman, Notary Public
Oakland County, Michigan
My Commission Expires: 12/3/89